

# EXHIBIT 45

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

\_\_\_\_\_  
:   
NICHOLAS HARRISON and :   
OUTSERVE-SLDN, INC., :   
:   
Plaintiffs, :   
: No.   
v. : 1:18-CV-00641-LMB-IDD   
:   
JAMES N. MATTIS, in his:   
official capacity as :   
Secretary of Defense; :   
MARK ESPER, in his :   
official capacity as :   
Secretary of the Army; :   
and the UNITES STATES :   
DEPARTMENT OF DEFENSE, :   
:   
Defendants. :   
\_\_\_\_\_:

Tuesday, January 9, 2019

Videotape Deposition of LT. COL. LISA  
M. LUTE, taken at the Law Offices of Winston &  
Strawn LLP, located at 1700 K Street Northwest,  
Washington, D.C., beginning at 9:26 a.m.,  
before Ryan K. Black, a Registered Professional  
Reporter, Certified Livenote Reporter and Notary  
Public in and for the District of Columbia.

A P P E A R A N C E S:

LAMBDA LEGAL

BY: SCOTT SCHOETTES, ESQUIRE

105 West Adams

Suite 2600

Chicago, Illinois 60603

312.663.4413

sschoettes@lambdalegal.org

Representing - Plaintiffs

WINSTON & STRAWN LLP

BY: CYRUS T. FRELINGHUYSEN, ESQUIRE

1700 K Street NW

Washington, DC 20006

202.282.5890

cfrelinghuysen@winston.com

Representing - Plaintiffs

1 A P P E A R A N C E S (Cont'd):

2  
3 U.S. DEPARTMENT OF JUSTICE

4 CIVIL DIVISION - FEDERAL PROGRAMS BRANCH

5 BY: ROBERT M. NORWAY, ESQUIRE

6 REBECCA CUTRI-KOHART, ESQUIRE

7 KERI L. BERMAN, ESQUIRE

8 Ben Franklin Station

9 P.O. Box 480

10 Washington, D.C. 20044

11 202.353.0889

12 robert.m.norway@usdoj.gov

13 rebecca.cutri.kohart@usdoj.gov

14 keri.l.berman@usdoj.gov

15 Representing - Defendants

16  
17 U.S. ARMY LEGAL SERVICES AGENCY

18 LITIGATION DIVISION

19 BY: MAJOR W. CASEY BIGGERSTAFF, ESQUIRE

20 9275 Gunston Road

21 Suite 3018

22 Fort Belvoir, Virginia 22060

23 703.693.1040

24 william.c.biggerstaff.mil@mail.mil

25 Representing - Department of the Army

1 ALSO PRESENT:

2 Alexandra Hemmings, Winston & Strawn Law Clerk

3 Solomon Francis, Legal Videographer

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## I N D E X

TESTIMONY OF: LT. COL. LISA M. LUTE	PAGE
-------------------------------------	------

By Mr. Schoettes	10
------------------	----

## E X H I B I T S

EXHIBIT	DESCRIPTION	PAGE
---------	-------------	------

Exhibit No. 1	the 30(b)(6) Notice of Deposition	21
---------------	--------------------------------------	----

Exhibit No. 2	a document titled Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with HIV	33
---------------	---	----

Exhibit No. 3	a photocopy of AR 600-110	99
---------------	---------------------------	----

Exhibit No. 4	a document Bates Numbered US00025589 through 25590	122
---------------	---	-----

Exhibit No. 5	a document Bates Numbered US00025945 through 25947	134
---------------	---	-----

Exhibit No. 6	an e-mail Bates Numbered US00025970 through 25973	147
---------------	--	-----

Exhibit No. 7	an e-mail Bates Numbered US00025689	161
---------------	--	-----

Exhibit No. 8	an e-mail Bates Numbered US00025924 through 25925	168
---------------	--	-----

Exhibit No. 9	a document titled Declaration of Lt. Col. Lisa Lute	178
---------------	--	-----

## I N D E X (Cont'd)

EXHIBIT	DESCRIPTION	PAGE
Exhibit No. 10	a document titled Department of Defense Instruction 1332.45	201
Exhibit No. 11	a document Bates Numbered US00006912 through 6919	203
Exhibit No. 12	a one-page Memorandum dated 9 November 2018, signed by Marshall M. Williams	213
Exhibit No. 13	a document titled Department of Defense Instruction Number 6490.07	216
Exhibit No. 14	a document Bates Numbered US00025937	228
Exhibit No. 15	an e-mail Bates Numbered US0002498 through 2500	232
Exhibit No. 16	a document Bates Numbered US00025518 through 25540	235
Exhibit No. 17	a document Bates Numbered US00001136	246
Exhibit No. 18	a document Bates Numbered US00001136	278
Exhibit No. 19	a document Bates Numbered US00000991 through 996	282

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X (Cont'd)

EXHIBIT	DESCRIPTION	PAGE
Exhibit No. 19A	a document titled Exception to	
	AR 600-110	283



1 condition to know whether or not they would --

2 A. Their condition, their management,  
3 their --

4 Q. Whether or not they would pose --

5 A. Whether or not they -- they are  
6 compliant with medication or anything like that,  
7 okay?

8 Q. Let me finish my -- my question, --

9 A. I'm sorry.

10 Q. -- but I -- but I think you answered  
11 it. So you don't know the extent to which their  
12 HIV is under control, how it is being managed,  
13 et cetera?

14 A. Correct.

15 Q. And what I heard you say was that if  
16 the person's HIV was not well-managed, --

17 A. Mm-hmm.

18 Q. -- and you said something about a  
19 count, and I believe what you're referring to  
20 is the viral load --

21 A. That would be correct.

22 Q. -- for HIV, that if it was -- if  
23 it was not well-managed, that then they could  
24 potentially present a risk in the context of  
25 a -- a battlefield transmission?

1           A.     There are other ways. I mean, they  
2           could present a risk. They could -- if an  
3           individual that is not properly managed or  
4           forthcoming regarding their diagnosis and they  
5           donated blood, it could impact the blood bank.  
6           And -- and, yes, we have screening on the blood  
7           bank that we use here, but we don't when you do  
8           a combat situation. It's -- it's a buddy  
9           donor-type system.

10          Q.     Have you ever heard of anyone with HIV  
11          in the military who knew their status attempting  
12          to donate blood?

13          A.     Yes, sir.

14          Q.     And when did that occur, or tell  
15          me -- how -- was it more than once or one time?

16          A.     I'm only aware of one time.

17          Q.     And when was that?

18          A.     I was in San Antonio, and that's as  
19          close as I can get you, okay? So I was there  
20          from, let me see, '14 -- 2014 to 2016.

21                 MR. NORWAY: And I'm going to  
22          interpose an objection that she's not being  
23          offered for -- for this topic.

24                 MR. SCHOETTES: Well, we'll come --  
25          we'll come back to that.

1 THE WITNESS: Okay.

2 BY MR. SCHOETTES:

3 Q. So you've now identified battlefield  
4 transmission as -- as a concern for someone  
5 whose HIV is not well-controlled, and the  
6 possibility of blood donation.

7 A. Well, I -- I would like, if I may,  
8 to -- to clarify something. Because in the  
9 battlefield, it doesn't matter if they're  
10 well-controlled or not with blood, because  
11 there's no research to support whether or not  
12 a significant exposure to a person with HIV's  
13 blood would be reduced or limited if they were  
14 on medication and managed properly. So I -- I  
15 -- you can't -- it would only -- the only  
16 research that -- that has been put out that  
17 -- that demonstrates that -- if they  
18 are effectively managed is that it reduces the  
19 risk of transmission with sexual interactions.

20 Q. So I think what you just said  
21 contradicts what you said earlier, which is that  
22 if someone was virally suppressed and had less  
23 than the 200 copies per milliliter of HIV, that  
24 then would be a negligible risk, --

25 A. And --

1           that can definitively say I -- the Army G-1 will  
2           not approve this. It at least needs to make it  
3           there, and then they need to say, we can't  
4           approve this, because it falls under the -- the  
5           instruction and we don't have the authority.

6           Q.     So when you say you would put the  
7           packet together and process it, you would  
8           process it within the Army --

9           A.     Mm-hmm.

10          Q.     -- and get that denial, if you will,  
11          because there's not the authority, and then at  
12          that point you would elevate it over to the  
13          Department of Defense?

14          A.     No. I would -- I would -- it goes  
15          back to the service member.

16                 Historically, if I know that what  
17          they're requesting is outside of what we can do,  
18          and I am involved in it in the beginning, I may  
19          tell them I will process this for a response,  
20          and I will ask them to familiarize themselves  
21          with the policies and the directives, the -- the  
22          DODIs that go along with the request.

23          Q.     And then do you advise them after  
24          either you tell them that or -- or you process  
25          it, do you tell them that they need to submit

1 this through a different channel?

2 A. I do not. I -- I recommend to them  
3 that -- that they might want to review the DODI  
4 and consider using the DODI as a guideline to  
5 make their request.

6 Q. Okay. Going back to your declaration,  
7 you make the statement that, I am aware of  
8 multiple soldiers who have been granted COCOM  
9 waivers to deploy.

10 MR. NORWAY: Objection; scope.

11 You may answer.

12 THE WITNESS: Yes. I said that.

13 Is that the question? I'm sorry.

14 BY MR. SCHOETTES:

15 Q. Yes. No, it is. That was just a  
16 baseline.

17 So are you -- is it -- are you saying  
18 that you're aware of soldiers living with HIV  
19 who have been granted COCOM waivers to deploy?

20 MR. NORWAY: Objection; scope.

21 THE WITNESS: Yes.

22 BY MR. SCHOETTES:

23 Q. And how did you become aware that  
24 soldiers living with HIV have been granted  
25 waivers to deploy?

1 MR. NORWAY: Yeah. Let's go off the  
2 record.

3 MR. SCHOETTES: Okay.

4 THE VIDEOGRAPHER: The time is 4:09  
5 p.m. We're going off the record.

6 (Recess taken.)

7 THE VIDEOGRAPHER: The time is 4:15  
8 p.m. We're back on the record.

9 Please proceed, Counsel.

10 MR. SCHOETTES: I'd like to ask the  
11 court reporter to record for us how much time we  
12 spent on the record thus far.

13 THE VIDEOGRAPHER: 5:51:36 and  
14 counting.

15 MR. SCHOETTES: Thank you.

16 MR. NORWAY: And we have no redirect.

17 MR. SCHOETTES: All right. Well, then  
18 we're done.

19 MR. NORWAY: Great. And we're going  
20 to read and sign.

21 THE REPORTER: Yeah. Okay.

22 MR. NORWAY: Thank you very much,  
23 Scott.

24 THE VIDEOGRAPHER: Time is 4:15 p.m.  
25 This concludes today's testimony given by Lt.

1 Col. Lisa Lute. We're now off the record.

2 (Deposition concluded -- 4:15 p.m.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Lt. Col. Lisa M. Lute

3 C E R T I F I C A T E

5 I do hereby certify that the aforesaid  
6 testimony was taken before me, pursuant to  
7 notice, at the time and place indicated; that  
8 said deponent was by me duly sworn to tell the  
9 truth, the whole truth, and nothing but the  
10 truth; that the testimony of said deponent was  
11 correctly recorded in machine shorthand by me  
12 and thereafter transcribed under my supervision  
13 with computer-aided transcription; that the  
14 deposition is a true and correct record of the  
15 testimony given by the witness; and that I am  
16 neither of counsel nor kin to any party in said  
17 action, nor interested in the outcome thereof.

18  
19 WITNESS my hand and official seal this  
20 24th day of January 2019.

21  
22 

23 Ryan K. Black  
24  
25



Veritext Legal Solutions  
1100 Superior Ave  
Suite 1820  
Cleveland, Ohio 44114  
Phone: 216-523-1313

January 24, 2019

To: Robert M. Norway, Esq.

Case Name: Harrison, Nicholas, et al. v. Mattis, James N., et al.

Veritext Reference Number: 3189088

Witness: Lt. Col. Lisa M. Lute                      Deposition Date: 1/9/2019

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to [production-midwest@veritext.com](mailto:production-midwest@veritext.com).

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,  
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW  
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 3189088

CASE NAME: Harrison, et al. v. Mattis, James N., et al.

DATE OF DEPOSITION: 1/9/2019

WITNESS' NAME: Lt. Col. Lisa M. Lute

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have made no changes to the testimony as transcribed by the court reporter.

\_\_\_\_\_  
Date Lt. Col. Lisa M. Lute

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;  
They signed the foregoing Sworn Statement; and  
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expiration Date

DEPOSITION REVIEW  
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 3189088

CASE NAME: Harrison, et al. v. Mattis, James N., et al.

DATE OF DEPOSITION: 1/9/2019

WITNESS' NAME: Lt. Col. Lisa M. Lute

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).

I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Lt. Col. Lisa M. Lute

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;  
They have listed all of their corrections in the appended Errata Sheet;  
They signed the foregoing Sworn Statement; and  
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expiration Date

ERRATA SHEET  
VERITEXT LEGAL SOLUTIONS MIDWEST  
ASSIGNMENT NO: 1/9/2019

PAGE/LINE(S) / CHANGE /REASON

1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	

\_\_\_\_\_  
Date Lt. Col. Lisa M. Lute  
SUBSCRIBED AND SWORN TO BEFORE ME THIS \_\_\_\_\_  
DAY OF \_\_\_\_\_, 20\_\_\_\_ .

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expiration Date